IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1065

SAMUEL D. WRIGHT,

Petitioner,

—against—

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 3, 1979

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In the

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No.

Samuel D. Wright,

Petitioner,

—against—

The United States of America.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Samuel D. Wright respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on December 4th, 1978.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at page 1a. The opinion rendered by the United States District Court for the Eastern District of New York appears in the Appendix at page 18a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 4th, 1978. This petition for certiorari is being filed within thirty days of that

date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the "appearance of conflict and impropriety" principle requires dismissal of an indictment where the wife of the prosecutor who obtained the indictment was a political opponent of petitioner?

Statement of the Case

The facts of this case, as they relate to the issue on which petitioner seeks a writ of certiorari, may be briefly stated. This Hobbs Act and conspiracy prosecution arose out of a charge that petitioner Wright, a New York State legislator who in 1973 was serving as the chairman of his local school board, extorted "under color of official right" $5,000 from Behavioral Research Laboratories, Inc. (hereinafter "BRL"), an educational supply company which did business with the school board.

The entire controversy in this case focused on petitioner's conduct when he attended, at the company's invitation, a BRL-sponsored educational conference in San Francisco, California. The government's case consisted of an allegation that Wright, who was supposed to receive a $500 honorarium for speaking at the conference, demanded, within the meaning of the Hobbs Act, an additional payment of $5,000. Petitioner, on the other hand, maintained that the $5,500 check that he received was a pre-arranged fee and not the result of any extortive conduct.

The issue raised in this petition for certiorari does not touch upon either the testimony or any other event which occurred during trial. Rather, this petition strikes at the

very manner in which this case was brought. The facts are as follows: Prior to trial, defense counsel moved, *inter alia*, for dismissal of the indictment upon an allegation of selective prosecution. In support of this charge, petitioner submitted that the prosecution was invidiously brought. The investigatory stages of this case were managed by Assistant United States Attorney Thomas Puccio, who did not appear for the government at trial. As stated in an affidavit submitted by petitioner's trial counsel:

> "The impropriety in question is founded upon the activist role *Mrs. Thomas Puccio*, an attorney we believe is employed in the community by a local federally funded poverty law office, has played as a public activist opposed to the leadership and role occupied by Samuel D. Wright. As a publically acknowledged opponent of Wright and his programs, her in-put with a senior member on the United States Attorney's staff, both actually and in appearance, pitted the might and resources of the federal government against Wright for reasons of political and ideological differences rather than due to an objective analysis of Wright's conduct." (Affdvt. of Gustave H. Newman, 7/5/77; A 27)* (Emphasis supplied)

In response, the United States Attorney submitted an affidavit which acknowledged that the investigation was in fact conducted by Mr. Puccio (A 42) and, further, that Puccio's wife was, until 1975, associated with the Brownsville Office of the Brooklyn Community Legal Services. (A 43) In his affidavit, then United States Attorney David Trager stated that:

> "I am advised that: Mrs. Puccio, whose name is Carol Zeigler, graduated from N.Y.U. Law School in June

* The letter "A" refers to petitioner's appendix filed in the Second Circuit Court of Appeals.

1973 and joined the Brownsville office in September 1973 prior to her admission to the New York Bar in March 1974, and after Mr. Wright was elected to membership on Local Board No. 23. She left the Brownsville office in 1975, approximately two years before the indictment was returned in this case, and long before Mr. Wright 'contested United States Representative Shirley Chisholm's bid for renomination.' She was not personally involved in any election campaign against the defendant, and whatever role she did play while in the Brownsville office was in her capacity as an attorney employed by the Brooklyn Community Legal Services Corp." (Trager Affdvt. p. 10, footnote; A 43)

This affidavit did not respond at all to the charge that Mrs. Puccio played an active role in opposition "to the leadership and role occupied by Samuel D. Wright." Instead, the prosecutor relied upon the fact that the decision to prosecute Wright was made by him "solely on the basis of the evidence, which I, and my chief assistant, thoroughly reviewed." (Trager Affdvt. A 43-44) Further, "it had nothing whatever to do with any desire by me to align myself with any particular faction opposed to Mr. Wright." (Trager Affdvt. A 44) The United States Attorney also drew reference to the fact that the Attorney General of the United States personally informed petitioner that he, the Attorney General, was satisfied that the investigation was being handled in a proper manner. In pertinent part, the letter stated that:

"A complete review of that investigation was undertaken by the Counsel on Professional Responsibility who reports directly to me and who has the responsibility for investigating complaints of misconduct by Department of Justice personnel. The Counsel concluded that the investigation has been conducted in a thorough and professional manner, under the direct supervision of the United States Attorney, and that it should continue to proceed in that fashion." (A 47)

Thus, the government had taken the position that they themselves had policed and scrutinized their own conduct and were satisfied that the investigation was conducted in good faith. Ultimately, this view of the issue was ratified by the district court and then affirmed by the Court of Appeals. The district court concluded that:

"On the basis of the representations made by the United States Attorney, and in light of the report by the Attorney General and the Counsel on Professional Responsibility, the court is satisfied that the prosecution has not been conducted in bad faith or as the result of improper influence from anyone outside the United States Attorney's Office." (Op. p. 5, A 66)

Although there was absolutely no opportunity to explore the facts in the district court, the Court of Appeals stated that it found no "impropriety or appearance of impropriety," relying in significant part on the Justice Department's review of its own conduct. Slip. op. at 488-89.

Reasons for Granting the Writ

Although petitioner recognizes that this Court is beleaguered by petitions for writs of certiorari, *Brown Transport Corp.* v. *Atcon, Inc.*, —— U.S. ——, No. 77-1581, December 4, 1978 (dissent of Mr. Justice White), this case, it is submitted, presents an issue of importance which has not heretofore been determined by this Court. Rule 19, *Supreme Court Rules;* see, e.g., *United States* v. *An Article of Drug, Etc.*, 394 U.S. 789, 791 (1969). In-

deed, the issue presented herein was described, in another context, as an issue of "unusual importance." *General Motors Corp.* v. *United States (In Re Grand Jury Subpoenas)*, 573 F.2d 936, 940 (6th Cir. 1978).

Both the district court and the United States Court of Appeals have concluded that since the Justice Department's Counsel on Professional Responsibility reviewed the instant investigation and concluded that there had been no misconduct, petitioner's contention should be summarily rejected. Petitioner respectfully submits that such a rule of law is obnoxious to the basic tenets of the adversary system and thus, this ruling should be reviewed by this Court.

In the *General Motors* case, the Sixth Circuit Court of Appeals had occasion to discuss an issue which is directly analogous to the case at bar. In *General Motors*, an attorney by the name of Meno W. Piliaris was conducting a grand jury investigation of the defendant corporation. The facts in that case revealed that Piliaris was an attorney employed by the Internal Revenue Service and, in that capacity, had earlier recommended to the Justice Department that a grand jury investigation begin. Moreover, Piliaris was intricately involved in the I.R.S. aspect of the case. *Even though the district court made no findings of any actual conflict of interest*, the circuit court issued an order terminating the grand jury investigation due to an appearance of impropriety.

> "This appearance of impropriety arises by reason of the prior connection of Mr. Piliaris with the investigation by IRS of the income tax returns of GM and the recommendations in which he participated when he was serving as an attorney for IRS in Cincinnati." 573 F.2d at 942.

See, also, *United States* v. *Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Texas 1977).

As argued in the court below, the same appearance of impropriety exists in this case. The ABA Standards Relating to the Prosecution Function, Section 1.2, provides in relevant part that:

> "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties."

Obviously, in an unusual case such as this, an appearance of impropriety surfaces. As Judge Kaufman stated in *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2nd Cir. 1974):

> ". . . we must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession." 501 F.2d at 649. (Emphasis in original)

The Sixth Circuit, in the *General Motors* case, observed that:

> "In the present case the worry of GM is that Piliaris has an axe to grind and is more interested in justifying his previous investigations, his recommendations, and the conduct of IRS agents than in protecting GM against unfounded criminal prosecution." 573 F.2d at 943.

It should be clear that the result in the *General Motors* case *(In Re Grand Jury Subpoenas)* would not have been different if the Counsel on Professional Responsibility had submitted an affidavit or letter stating that Piliaris' conduct had been reviewed and approved. Simply stated, the fact that the Justice Department was satisfied with its

own conduct is of no moment and such "representations" should not have been rubber-stamped by the courts before which it came.

With a United States Attorney's office that employs some thirty-five assistants in its criminal division, why should an assistant who could, as the Sixth Circuit Court of Appeals noted, conceivably have had an "axe to grind" have presented this case to the grand jury? The uncertainty which is inherent in this question demonstrates, despite the assurance of the Justice Department officials to the contrary, that there was a fatal stigma attached to the grand jury presentation and, accordingly, the indictment should have been dismissed. This case, it is submitted, would present this Court with an opportunity to review and decide the relevant criteria in applying the concededly important "appearance of impropriety" standard.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

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January 3, 1979

APPENDIX

Appendix A

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 176—August Term, 1978.

(Argued September 12, 1978 Decided December 4, 1978.)

Docket No. 78-1219

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAMUEL D. WRIGHT,

Appellant.

Before:

SMITH, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from judgment of conviction and sentence on trial to the jury in the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge,* for violation of the Hobbs Act, 18 U.S.C. § 1951, and conspiracy, 18 U.S.C. § 371. Affirmed.

GERALD L. SHARGEL, New York, N.Y. (Fischetti & Shargel, New York, N.Y., Gustave H. Newman and Roger Bennett Adler, of counsel), *for Appellant.*

EDWARD R. KORMAN, United States Attorney for the Eastern District of New York, *for Appellee.*

SMITH, *Circuit Judge*:

This is an appeal from conviction and sentence on trial to the jury in the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge*, of a school board official for solicitation and receipt "under color of official right" of a payment of $5,000 from a seller of school supplies, in violation of the Hobbs Act, 18 U.S.C. § 1951, and conspiracy to defraud the United States of federal funds granted to the school district, in violation of 18 U.S.C. § 371. We find no reversible error and affirm the judgment.

In 1973, while Wright was chairman of New York City Community School Board 23, Behavioral Research Laboratories, Inc. ("BRL"), a seller of educational systems and materials to schools, which had a contract with the board for the 1972-73 school year amounting to over $500,000, invited Wright to speak at a conference which it conducted. Wright received $5,500 for this appearance, $5,000 of which the government contended and the jury must have found was induced by Wright and paid by BRL to influence the decision of the board to purchase educational materials from BRL.

On appeal, Wright contends that the evidence was insufficient to show that the payment was solicited in order to influence his official action, that the government wrongfully refused to grant immunity to a witness, that the admission of an out-of-court statement deprived him of his right to confront the witnesses against him, that the prosecution was biased and that the government's inflammatory summation deprived him of a fair trial. We find all of Wright's contentions to be without merit and affirm for the reasons discussed below.

Wright argues that the evidence was not sufficient to support a conviction on either the Hobbs Act count or the conspiracy count. He claims that there was no proof that he demanded anything from BRL under color of official right. Rather, Wright insists that the evidence shows nothing more than a request by him for an increase in the honorarium that he was to be paid for his appearance at the BRL conference. He contends that such an innocent attempt to negotiate a fee to which he had a legal right cannot constitute a violation of the Hobbs Act. Likewise, Wright contends that the conspiracy conviction must be reversed because there was no proof of an agreement, express or implied, between Wright and BRL to defraud the United States.

We disagree with Wright's characterization of the case against him and conclude that the evidence, viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), was sufficient to support the jury's verdict.

In late 1972 or early 1973, James Phipps, then the Divisional Marketing Director of BRL and responsible for sales in the Northeast region of the country, invited Wright to speak at a conference to be held by BRL on February 1 and 2, 1973 at a hotel in San Francisco. Wright accepted the invitation and delivered a forty-five minute address on February 2. The other speakers at the conference were the education editor of Newsweek magazine, the president of the American Federation of Teachers, the director of the National Institute for Education and John Tunney, United States Senator from California.

Phipps received a telephone call from Wright on February 3, as a result of which they later engaged in a conversation in the lobby of the hotel. Phipps testified that Wright asked whether the honorarium he was to receive could be increased. During the same conversation, Wright referred to the expenditures that would be incurred in conducting a successful election campaign and mentioned that people in the district which he represented found it very difficult to raise funds. However, when Phipps was asked on the witness stand whether Wright asked "for anything with regard to the funds necessary to run a political campaign," he responded, "Not specifically, no."

Phipps subsequently conveyed the substance of his conversation with Wright to Bert Parker, BRL's Vice President for Marketing. Allan Calvin, Chairman of the Board of BRL, testified that Parker then informed him that Wright had requested a $5,000 cash political contribution.[1] As a result of his conversation with Parker, Calvin asked Phipps to request Herbert Corbin, president of Kanan, Corbin & Shupack ("KCS"), BRL's public relations firm, to "generate the cash for the political contribution." Corbin resisted the request, but after a conversation with Parker, he agreed that KCS would issue a $5,500 check to Wright if BRL would first issue a check for that amount payable to KCS.

Meanwhile, Roger Sullivan, the president of BRL, had approved four separate check request forms to pay the conference speakers. (Senator Tunney's agent previously had been paid $2,500, of which the Senator was to receive $1,500.) One request form, in the amount of $700, was

1 This and other testimony was admitted under Fed. R. Evid. 801 (d)(2)(E) as the statement of a co-conspirator, subject to subsequent proof of the existence of the conspiracy. Wright does not contend that the testimony was not admissible under the rule.

for the Newsweek education editor. The other three, including Wright's, were each in the amount of $500. Four checks were drawn on BRL's account at the United California Bank, but all were voided on February 12, before they could be delivered. On that same day, BRL issued a $5,500 check to KCS. The request for this check was not a printed form, but instead a handwritten page from the memo pad of Carl Peters, BRL's Comptroller, containing the words "5,500.00 Herb Corbin." Three days later, Sullivan approved a printed check request form in the amount of $1,700 payable to KCS. This form included a handwritten list of the other three speakers and the same amounts as requested in the original individual forms. A check for $1,700 was issued to KCS, which in turn issued separate $500 and $700 checks to the three speakers.

On February 14, KCS issued a $5,500 check payable to Wright. Corbin gave this check to Phipps, who delivered it to Wright's office. Phipps testified that he handed the check to Wright, who in return gave him a letter of intent which indicated that Wright's school district was interested in renewing and expanding the program that it had purchased from BRL. Calvin and Parker were dissatisfied with this first letter and sought to obtain a stronger one. A second letter of intent bearing Wright's signature and dated February 23 was subsequently delivered to BRL. Both of these letters violated a directive of the Chancellor of the Board of Education of the City of New York, which forbade the issuance of letters of intent without the Chancellor's approval.

In August 1973, Community School Board 23 approved the purchase of an expanded program from BRL. The vote was five to four, with Wright and the other four board members who had run for election as part of his slate casting the votes in favor of the purchase. The funds used to

purchase the program were provided by the federal government under Title I of the Elementary and Secondary Education Act of 1965.

This court in *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976), approved the Seventh Circuit's description of the offense of extortion under color of official right as set forth in *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975):

> The use of office to obtain payments is the crux of the statutory requirement of "under color of official right" .... It matters not whether the public official induces payments to perform his duties or not to perform his duties .... So long as the motivation for payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951.

The trial judge here correctly instructed the jury that § 1951

> would not bar the payment to, and receipt by defendant of an honorarium or speaking fee, unless you are satisfied beyond a reasonable doubt that the payment focused on his public office and ability to aid B.R.L. and the defendant knew that that was the reason the money was paid to him.

Appellant asserts that the evidence failed to establish that he *demanded* a cash political contribution. He argues that a strictly voluntary payment by BRL would not amount to extortion within the meaning of 18 U.S.C. § 1951, citing *United States* v. *Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976). He further contends that we need only look to the Phipps-Wright conversation in

the hotel lobby to determine whether or not there was proof of a demand under color of official right. We decline, however, to view the proof so narrowly, for it is settled law that the evidence "must be viewed in light of the totality of the Government's case, since one fact may gain color from others." *United States* v. *Traumunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974).

The jury properly could have found Wright guilty beyond a reasonable doubt of a violation of the Hobbs Act. Phipps' testimony that Wright did not specifically ask for a political contribution did not preclude the jury from reaching such a verdict. The jury would have been justified in giving weight to Phipps' testimony that Wright spoke of the difficulties of campaign fund-raising. They could have concluded, as did BRL, that Wright was seeking to use the power of his public office to obtain $5,000 in addition to the concededly legal $500 honorarium. Wright's assertion of his innocent motives is further undercut by the simultaneous exchange of the $5,500 check for the first letter of intent. In addition, Wright's action in providing both letters of intent in contravention of an explicit directive of the Chancellor of the Board of Education supports a conclusion that the letters and Wright's successful efforts to increase the district's purchases from BRL were part of a *quid pro quo* involving the additional $5,000.[2]

The indictment also charged Wright with conspiring with BRL to defraud the United States by depriving it of "the impartial, fair and honest distribution of federal funds and of the faithful and honest participation of the

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2 Evidence of such a *quid pro quo* may be forthcoming in an extortion case, although it is not an essential element of the crime. *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

Board of Education of the City of New York in the financial grant program under Title I of the Elementary and Secondary Education Act of 1965," in violation of 18 U.S.C. § 371.

Wright contends that there was no proof that he agreed with BRL to defraud the United States. We disagree. The agreement which constitutes the essence of a conspiracy need not be explicit, but can be inferred from the facts and circumstances of the case. *Iannelli* v. *United States*, 420 U.S. 770, 777 n. 10 (1975); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946); *United States* v. *Green*, 523 F.2d 229, 233 n. 5 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). The facts which we have already discussed were sufficient to support a finding that Wright implicitly agreed to exercise the powers of his office to bring about the expenditures of federal funds for continued and expanded purchases from BRL in return for BRL's additional $5,000 payment to him.

Wright next contends that the government's failure to provide use immunity to Parker, pursuant to 18 U.S.C. §§ 6001-6003, deprived appellant of his right to due process guaranteed by the fifth amendment. He concedes that the decision to confer immunity ordinarily is within the sole discretion of the prosecutor. *United States* v. *Housand*, 550 F.2d 818 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977). But, citing *United States* v. *Morrison*, 535 F.2d 223 (3d Cir. 1976), Wright argues that under extraordinary circumstances, due process may require that the government confer use immunity on a witness for the defendant.

Wright alleges that such extraordinary circumstances existed here. He contends that Parker was "perhaps the most critical witness" against him in that Parker's alleged out-of-court statement to Calvin constituted the only evidence that Wright had demanded a political contribution

from BRL. Wright notes that Calvin testified that in his presence Parker denied having transmitted any such demand for money. Thus Wright argues that Parker's own testimony in court was essential to provide him with a fair trial. He contends that the government's refusal to confer use immunity deprived him of that testimony, because Parker's attorney said that without such immunity Parker would claim his fifth amendment right against self-incrimination and refuse to testify.

Our summary of the evidence, set out above, makes clear that Parker's extra-judicial statement in fact was not the only, nor even the most important, evidence that Wright extorted money from BRL. But we do not find it necessary to decide under what circumstances, if any, due process would require the government to confer use immunity on a witness at the request of a defendant.[3] For we conclude that Wright failed to make a sufficient showing that he desired to have Parker testify and that Parker would refuse to testify without use immunity.

After Corbin testified that Parker had denied transmitting Wright's demand to Calvin, appellant's counsel obtained from the government Parker's address in Oregon and the name of his attorney in New York. Appellant's counsel later told the court that he had spoken by telephone with Parker's attorney who asserted that Parker would not speak with Wright's lawyer and that Parker would "take the Fifth Amendment" if Wright sub-

3 Courts which have confronted this question have reached a variety of results. *Compare, e.g., United States* v. *Morrison*, 535 F.2d 223, 229 (3d Cir. 1976) (immunity required because of prosecutorial misconduct), and *Earl* v. *United States*, 361 F.2d 531, 534 n. 1 (D.C. Cir. 1966) (immunity might be required if government granted it to its own witness), *cert. denied*, 388 U.S. 921 (1967), *with United States* v. *Ramsey*, 503 F.2d 524, 532 (7th Cir. 1974) ("no merit to the argument" that defendant has constitutional right to immunity for his witness), *cert. denied*, 420 U.S. 932 (1975).

poenaed him. Wright's counsel then said that if he subpoenaed Parker, he would ask the government to confer immunity on him. The trial court urged appellant's counsel to issue a subpoena as soon as possible. Counsel indicated that he would do so. At that point, the prosecutor informed the court that he did not intend to seek a grant of use immunity for Parker because he did not believe such a grant to be "in the public interest" as required by 18 U.S.C. § 6003(b)(1).[4] On the following day, however, the prosecutor offered to provide Parker with informal "letter immunity,"[5] the type of immunity which had been granted to a number of the government's witnesses. He also stated that if Parker found that proposal unacceptable, he would attempt to obtain authorization from the Justice Department for an application for use immunity,[6] despite his own belief that the request would not satisfy the Department's criteria.

On the next day, Wright's attorney informed the court that he had again spoken with Parker's attorney, who stated that he (Parker's attorney) would not be satisfied with letter immunity and that he would insist on "full-blown

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4 18 U.S.C. § 6003(b) provides that:

A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest. . . .

5 Letter immunity consists of a promise by the particular United States attorney not to prosecute the witness for his participation in the transaction about which he testifies. The government now contends that this promise would have been enforceable against United States attorneys in other districts as well.

6 18 U.S.C. § 6003 requires that a local United States attorney obtain approval of a request for an order compelling testimony pursuant to a grant of use immunity. See note 4, *supra*.

immunity." Wright's attorney then told the court that "as a result, I am not wasting any money to subpoena his client." The record discloses no further communications between Wright's counsel and either Parker or his attorney. No subpoena was issued.

We conclude that Wright failed to establish the need for a grant of use immunity to Parker. Wright argues that the proposition "that there was an insufficient basis on which to apply for statutory immunity . . . is clearly without merit," because 18 U.S.C. § 6003(b)(2) provides that an application for immunity can be made where an individual "has refused or is likely to refuse to testify." This argument falls wide of the mark because the issue presented here is not whether the government had the *power* to apply for a grant of immunity, but rather whether it had an *obligation* to do so. We hold that it did not.

The key question raised by Wright's due process claim is whether the failure to grant immunity denied him a fair trial. Because Wright failed to subpoena Parker and to prove any need for use immunity, he cannot now demonstrate that the refusal to confer immunity prejudiced his trial. Here, as in *United States* v. *Carman*, 577 F.2d 556, 561 (9th Cir. 1978), the appellant's argument "is based purely on speculation as to what [the witness] would do *if called* to the stand." (Emphasis in original.) It is true that Parker's attorney asserted that his client would not testify without use immunity. But without calling Parker to the witness stand, "neither [the appellant] nor anyone else could be certain that [the witness] would assert his right against self-incrimination." *Id.* It is not improbable that Parker, for reasons of his own, might have preferred to avoid having to travel from Oregon to New York in order to testify about his role in the payment to Wright. Whether Parker would have maintained the position that

his attorney asserted, had he actually been subpoenaed and called to the stand, is a matter of speculation upon which this court cannot base a finding that Wright was denied his due process right to a fair trial.

Wright also suggests that the refusal to grant immunity violated his sixth amendment right to have compulsory process for obtaining witnesses in his favor. A claim that the use immunity statute is unconstitutional because witnesses and defendants are not authorized to compel testimony on the same basis as the government was rejected in *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973), where the court said:

> The sixth amendment assures an accused "compulsory process for obtaining witnesses in his favor." But the authors of the Bill of Rights did not deem it essential to enhance this right by empowering the accused to confer immunity, and nowhere in the Constitution do we find any justification for conditioning the government's ability to grant immunity on a corresponding grant to private individuals.

It has also been held that the sixth amendment imposes no obligation on the government to confer immunity on a witness at the defendant's request. *United States* v. *Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); *compare*, *United States* v. *Lacouture*, 495 F.2d 1237 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974); *see generally Kastigar* v. *United States*, 406 U.S. 441, 443-47 (1972). *But see United States* v. *Leonard*, 494 F.2d 955, 985 n. 79 (D.C. Cir. 1974) (Bazelon, *C.J.*, concurring in part and dissenting in part); *United States* v. *La Duca*, 447 F. Supp. 779, 787 (D.N.J. 1978) (dictum).

We need not determine whether the sixth amendment might ever require the government to confer immunity on

a defense witness. Wright did not avail himself of the compulsory process to which he clearly was entitled, the right to subpoena Parker. He cannot now complain that he was denied whatever other rights he might have had under the compulsory process clause, had his unexercised right of subpoena proved unavailing.

We next consider Wright's argument that he was denied his sixth amendment right to confront the witnesses against him when the government failed itself to call Parker as a witness after the admission of the extra-judicial statement. He argues that Parker's statement was crucial to the government as well as devastating to the defense and that there was nothing inherently reliable about the statement.

Wright does not claim on appeal that Calvin's testimony reporting Parker's statement did not satisfy the requirements of Fed. R. Evid. 801(d)(2)(E), as the statement of a co-conspirator. That the testimony was admissible under the rules of evidence does not, however, conclude our inquiry, but merely turns our attention to the constitutional issue involved. The confrontation clause is not merely the equivalent of the hearsay rules. *Dutton* v. *Evans*, 400 U.S. 74, 81-82 (1970); *California* v. *Green*, 399 U.S. 149, 155-56 (1970).[7]

The Supreme Court has not ruled upon the interrelation of Rule 801(d)(2)(E) and the confrontation clause. Some circuits have adopted the position that a statement of a co-conspirator admissible under Rule 801(d)(2)(E) per se satisfies the requirements of the confrontation clause. *United States* v. *Johnson*, 575 F.2d 1347 (5th Cir. 1978);

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7 The Supreme Court in *Dutton* characterized the co-conspirator rule as a hearsay exception. The new Federal Rules of Evidence adopted the opposing view that the statement of a co-conspirator simply does not come within the definition of hearsay. This change in terminology has no significance for the purpose of determining whether admission of a statement into evidence satisfies the confrontation clause.

United States v. *Papia*, 560 F.2d 827 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973). This court, however, previously has concluded that *Dutton* mandates a case-by-case examination to determine whether the defendant's right of confrontation has been abridged. *United States* v. *Puco*, 476 F.2d 1099 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973); *accord*, *United States* v. *Davis*, 578 F.2d 277 (10th Cir. 1978); *United States* v. *Kelley*, 526 F.2d 615 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976); *United States* v. *Snow*, 521 F.2d 730 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976).

In *Puco*, 476 F.2d at 1103, we read the plurality opinion in *Dutton* as indicating that "the presence of sufficient 'indicia of reliability' may, in some circumstances, permit the prosecution to introduce out-of-court statements into evidence even though the declarant is available to it and the defendant has never had an opportunity to cross-examine him." We held that this rule applied at least where the statement is not "crucial" to the prosecution or "devastating" to the defendant.

We believe that Parker's extra-judicial statement bore sufficient indicia of reliability to assure that "the trier of fact [had] a satisfactory basis for evaluating the truth of the prior statement." *Dutton* v. *Evans*, *supra*, 400 U.S. at 89, quoting *California* v. *Green*, *supra*, 399 U.S. at 161. In *Puco*, we suggested that "[i]n most cases the determination that a declaration is in furtherance of the conspiracy . . . will decide whether sufficient indicia of reliability were present. While there may be exceptions, we do not think that they will be frequent." 476 F.2d at 1107-08. There is nothing that will lead us to conclude that Parker's statement is one of those exceptions. First, the possibility that Parker was relying on faulty recollection is remote. He

made the statement to Calvin either the same day as or the day after he learned of Wright's desire to obtain $5,000. Second, the circumstances were such that there is no reason to believe that Parker misrepresented what Phipps told him. Parker had no motive to want his superiors to believe that Wright was seeking a political contribution if in fact he had asked only for an honest renegotiation of his honorarium. Lastly, the circumstances and general nature of Parker's statement are corroborated by other testimony of witnesses who were subjected to substantial cross-examination. Phipps confirmed that a meeting with Wright took place after the conference. Phipps also testified that he conveyed his conversation with Wright to Parker, telling him that Wright had "intimated . . . that he was hopeful of getting a substantial amount of money." Calvin testified that he asked Phipps to contact Corbin and to arrange "for the political contribution to Mr. Wright" and that Phipps replied that he would do so. Corbin testified that first Phipps and then Parker telephoned him to arrange the issuance of the $5,500 check. As a result of all these factors, we believe that the jury could adequately weigh the credibility and importance of Parker's statement.

We also conclude that Parker's statement was neither "devastating" nor "crucial." As we said in *Puco*, 476 F.2d at 1104, "Admittedly, these terms do not offer a precise standard, but we interpret them as requiring that the evidence be in some way essential, indeed central, to the prosecution's case." Our review of the evidence has demonstrated that there was a sufficient basis for the jury to convict Wright on both counts without any reference to Parker's statement. Wright argues that the statement is crucial because it was the only evidence that he demanded a "political contribution." We have already stated that it was not necessary that the government show that Wright

asked for a contribution *in haec verba* and that the jury could infer an extortive demand from the testimony of Phipps and the surrounding circumstances. Finally, appellant's attempt to place importance on the use of the words "political contribution" is defeated by his own success in cross-examination of Calvin, during which the witness conceded that he did not recall the exact words that Parker had used. In light of these facts, we cannot conclude that the out-of-court statement was in any way crucial or essential to the government's case. Thus no error was committed in allowing the testimony without an opportunity to cross-examine Parker.

Wright's two remaining grounds of appeal require little comment. We do not condone the prosecutor's repeated use of the term "preparations man" in referring to Wright's experience in preparing cases for trial while employed in the office of the Corporation Counsel of the City of New York. These references may have crossed "the exceedingly fine line which distinguishes permissible advocacy from improper excess." *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). But viewed in the context of a summation which totaled several hours at the conclusion of a rather long and hotly contested trial, whatever inappropriate comments were made did not deprive the defendant of a fair trial, and thus reversal is not warranted. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 242 (1940); *United States* v. *White, supra*, 486 F.2d at 207.

The district court properly rejected Wright's claim that the prosecution against him was biased because the wife of the Assistant United States Attorney who presented this case to the grand jury was allegedly a political opponent of Wright. The Justice Department's Counsel on Profes-

sional Responsibility reviewed the investigation and concluded that there had been no misconduct. We agree that no showing of bias of the prosecutor was made here. The American Bar Association Standards Relating to the Prosecution Function, §1.2, provides that "A conflict of interest may arise when, for example, . . . a business partner or associate or a relative has any interest in a criminal case, either as a complaining witness, a party or as counsel." None of these circumstances was present here. We find no impropriety or appearance of impropriety.

The judgment is affirmed.

Appendix B

(Memorandum and Order)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 CR 181

UNITED STATES OF AMERICA,

—against—

SAMUEL D. WRIGHT,

Defendant.

APPEARANCES:

DAVID G. TRAGER, Esq.
United States Attorney,
Eastern District of New York
By EDWARD R. KORMAN, Esq.
Chief Assistant U.S. Attorney

GUSTAVE H. NEWMAN, Esq.
Attorney for Defendant

NEAHER, District Judge.

Defendant moves for dismissal of the indictment herein on the grounds that it was a product of selective prosecution, its factual allegations are legally insufficient, and certain improprieties occurred in the grand jury proceedings.

The indictment charges that defendant, while chairman of New York City Community School Board 23 in 1973, unlawfully obtained money from Behavioral Research Laboratories ("BRL") "under color of official right" in violation of the Hobbs Act, 18 U.S.C. §1951,[1] and conspired with BRL to defraud the United States in violation of 18 U.S.C. §371.[2] The payment was allegedly solicited and paid to defendant while BRL was seeking hundreds of thousands of dollars' worth of business from the school board.

To substantiate his claim that he is the victim of a discriminatory prosecution, defendant requests the court to conduct an *in camera* examination of the government's files and, if it finds that the prosecution was brought in bad

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[1] In pertinent part, 18 U.S.C. §1951 provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * * * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

[2] Under 18 U.S.C. §371 it is a crime for "two or more persons [to] conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose . . . ."

faith, to dismiss the indictment. The Second Circuit has declared:

> "To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith . . . ." *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2 Cir. 1974).

Although the affidavit of his attorney, Gustave H. Newman, Esq., presents allegations perhaps sufficient to satisfy the second requirement, defendant has failed to offer any proof to meet the first requirement.[3] Defendant's request for an *in camera* examination of the prosecution's files must therefore be rejected. *Id.* at 1211-12.

Nevertheless, defendant's claim of bad faith prosecution warrant further discussion. Newman, his attorney, alleges that two separate grand juries, one in 1973 and one in 1974-75, investigated defendant's affairs, including the payment from BRL, and found no criminality. In 1976 defendant, a City Councilman in New York City and "a potent leader in the Black community," ran against incumbent United States Representative Shirley Chisholm in a bitterly fought primary which divided Brooklyn's black community. Although defendant lost, his attorney now alleges that his opponents pressed both the District Attorney and the United States Attorney to launch a prosecution against defendant. According to his attorney, these efforts succeeded in the United States Attorney's office in this district because the Assistant United States Attorney in charge of the investigation was influenced by his wife, an attorney who was involved with the political faction that has opposed defendant in his quest for public office.

[3] The government asserts that defendant is unable to satisfy the first requirement because at least three officials were indicted and convicted in this district on similar violations of law since the present United States Attorney entered office in 1974. *United States* v. *Trotta*, 525 F.2d 1096 (2 Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States* v. *Christenfeld*, 75 CR 896; *United States* v. *McGrath*, 76 CR 156.

David G. Trager, Esq., the United States Attorney for this district, has submitted his personal affidavit refuting defendant's charges. As part of his efforts to combat official corruption after his appointment as United States Attorney in 1974, he created an Official Corruption Unit, which began investigating defendant in late 1974. The first witnesses concerning the BRL payment were not called before a grand jury until 1975. No previous grand jury had considered the matter. Trager further alleges that in 1976 he personally decided to continue the investigation into the BRL payment, and that the Assistant United States Attorney, whose wife allegedly was an active opponent of defendant, had nothing to do with this decision. On March 30, 1977, in response to a letter from defendant alleging improprieties in the investigation of his affairs, Attorney General Griffin Bell advised defendant by letter that the Justice Department's Counsel on Professional Responsibility had reviewed the investigation and had concluded

> "that the investigation has been conducted in a thorough and professional manner, under the direct supervision of the United States Attorney, and that it should continue to proceed in that fashion."

On April 1, 1977, the grand jury handed up the indictment, which had been delayed pending the report of the Counsel on Professional Responsibility.

On the basis of the representations made by the United States Attorney, and in light of the report by the Attorney General and the Counsel on Professional Responsibility, the court is satisfied that the prosecution has not been conducted in bad faith or as the result of improper influence from anyone outside the United States Attorney's office.

Defendant's next argument is that the Hobbs Act charge must be dismissed as deficient in that it fails to allege he was involved with organized crime and that he employed some manner of coercion in obtaining the payment from BRL.[4] Such allegations, however, are unnecessary to make out a violation of the Hobbs Act. In *United States* v. *Caci*, 401 F.2d 664 (2 Cir. 1968), *vacated in part on other grounds*, 394 U.S. 310, *cert. denied in part*, 394 U.S. 917, 931 (1969), the Second Circuit rejected the position that the Hobbs Act was limited to racketeering cases. See also *United States* v. *Brecht*, 540 F.2d 45, 51 (2 Cir. 1976). Overt coercion is also not an element of the crime, for defendant is charged with obtaining money "under color of

[4] The Hobbs Act charge in the indictment reads as follows:

"On or about and between February 3, 1973 and February 14, 1973, . . . the defendant, SAMUEL D. WRIGHT, unlawfully did attempt to affect commerce and unlawfully did affect commerce, and the movement of goods and services in commerce, . . . by knowingly and wilfully obtaining from Behavioral Research Laboratories, Inc., pursuant to a request by him for a substantial sum of money, Five Thousand ($5,000.00) Dollars, the consent of Behavioral Research Laboratories, Inc. to that payment having been induced by the defendant, SAMUEL D. WRIGHT, under color of official right." Count II.

official right" rather than through "force, violence, or fear," which is a separate part of the Hobbs Act. *United States* v. *Trotta, supra*, 525 F.2d at 1100 n. 7. "[I]t is the use of the power of the public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense." *Id.* at 1101. This was adequately alleged in the indictment. Defendant's contention that the BRL payment was owed him as an honorarium for his participation in a program sponsored by BRL is a defense which must be tested at trial.

Defendant also challenges the sufficiency of the charge of conspiracy to defraud the United States. The indictment alleges the defendant and BRL

> "wilfully and knowingly did conspire to defraud the United States and its departments and agencies in connection with the performance of its lawful governmental functions by depriving the United States of the impartial, fair and honest distribution of federal funds and of the faithful and honest participation of the Board of Education of the City of New York in the financial grant program under Title I of the Elementary and Secondary Education Act of 1965." Count I.

First, defendant asserts that there was no fraud upon the United States because the alleged conspiracy focused on the distribution of local school board funds. The indictment clearly charges, however, that defendant conspired to misuse federal funds that were given to the school board. Second, defendant argues that the charge is defective because it contains no allegation that BRL knew that the funds used to purchase its products were federal funds. The government properly responds that the charge in the indictment, as it stands, is adequate because it apprises de-

fendant, "with reasonable certainty, of the nature of the accusation against him." *Russell* v. *United States,* 369 U.S. 749, 765 (1962). Even if the government must show that BRL knew that federal funds were involved, the allegation that BRL "knowingly did conspired to defraud the United States" with respect to Title I funds is sufficient. Third, defendant contends that the conspiracy charge must fall because the alleged conspirators had different aims, namely, defendant allegedly wanted to extort money from BRL, while BRL allegedly wanted to bribe defendant. Even if this be true, however, the separate aims combined smoothly in a conspiracy to defraud the United States. The crimes of bribery and extortion often are present in the same transaction. See *United States* v. *Kahn,* 472 F.2d 272, 279 (2 Cir.), *cert. denied,* 411 U.S. 982 (1973).

In his final set of arguments, defendant maintains that there were certain failings and improprieties in the grand jury proceedings. First, his attorney alleges that, "[u]pon information and belief, facts sufficient to establish the interstate commerce element of a Hobbs Act violation were not presented to the grand jury." Newman Affidavit at 16-17. Absent any suggestion of improper use of the grand jury, the court is unwilling to exercise its discretion and inspect the grand jury minutes to determine whether there was proof of the interstate commerce element. See *United States* v. *Costello,* 350 U.S. 359 (1956); *United States* v. *Tane,* 329 F.2d 848 (2 Cir. 1964). With respect to the interstate commerce element, the Second Circuit has stated: "Given the sweeping power of Congress under the commerce clause . . . particularly evident in the Hobbs Act, it is enough that the extortion 'in any way or degree' . . . affects commerce, though its effect be merely potential or subtle." *United States* v. *Augello,* 451 F.2d 1167, 1170-71

(2 Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972). The indictment alleges that BRL has its principal place of business in California, and the government alleges that the grand jury was advised that BRL maintains a permanent office in New York. The depletion of assets (the payment to defendant) of this out-of-state firm, apparently involved in interstate commerce, may be enough to satisfy the interstate commerce element of the Hobbs Act. *Id.* Resolution of this issue must await trial.

Defendant also suggests that the government has breached its legal and ethical duty to introduce exculpatory evidence before the grand jury. His attorney alleges that four witnesses who gave exculpatory evidence before "the non-indicting 1973 Grand Jury" were not called before the grand jury which indicted defendant in 1977. As mentioned above, the government states that there were no grand jury proceedings against defendant in 1973 and that the only grand jury investigation into the BRL payment began in 1975 and concluded with the indictment in 1977. Furthermore, the government denies that any of the four witnesses named by defendant gave any testimony with respect to the BRL payment. In any event, the government has consented to allow defendant's counsel to examine any grand jury testimony of the four persons named by defendant.

Finally, defendant alleges that the government improperly used hearsay evidence before the grand jury without describing it as such. The court is satisfied with the government's response:

> "Each of the critical witnesses against the defendant, who we presently intend to call at trial, testified personally before the grand jury and, of course, the corroborating documents were marked as evidence. We,

> of course, intend to turn the grand jury testimony over to the defendant, pursuant to Title 18 U.S.C. §3500, so that the defendant will have ample opportunity to confirm our representation." Memorandum of Law for the United States at 41.

If defendant, after reviewing the grand jury testimony provided him, finds reason to raise this issue again, the court will deal with it at that time.

Accordingly, defendant's motion to dismiss the indictment and his request that the court conduct an *in camera* inspection of the government's files and of the grand jury minutes are denied.

So Ordered.

Dated: Brooklyn, N.Y.
March 28, 1978

Edward R. Neaher
U. S. D. J.